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Military commission proceedings against Omar Khadr resume, as USA disregards its international human rights obligations

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Each year for the past 34 years, the US State Department has published its global report on human rights in other countries. The introduction to its most recent report, published on 11 March 2010, addressed a criticism that has often been levelled against the USA:

“Some critics, in the United States and elsewhere, have challenged our practice of reviewing every other country’s human rights record but not our own. In fact, the US Government reports on and assesses our own human rights record in many other fora pursuant to our treaty obligations (e.g., we file reports on our implementation of the two Optional Protocols to the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the International Covenant on the Elimination of Racial Discrimination, and the Convention Against Torture).”

Two years ago, the USA appeared in front of the UN Committee on the Rights of the Child for that treaty body to examine US compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ratified by the USA in 2002. Among other things, the Committee called on the USA to:

“Conduct investigations of accusations against detained children in a prompt and impartial manner, in accordance with minimum fair trial standards. The conduct of criminal proceedings against children within the military justice system should be avoided”.

In direct contradiction of the Committee’s unequivocal recommendation, military commission proceedings are resuming against Omar Khadr in the US Naval Base in Guantánamo Bay in Cuba, where this Canadian national has been held since soon after he turned 16. Omar Khadr was 15 years old when he was taken into US custody in the context of the armed conflict in Afghanistan on 27 July 2002. He is now 23. He has spent a third of his life in US military detention. He is still waiting for justice.

The ‘justice’ that Omar Khadr is in line for is to be prosecuted in military proceedings that fall short of international fair trial standards, and that have no juvenile justice provisions.¹ If convicted in the military commission proceedings, Omar could face a sentence of life imprisonment without the possibility of parole, in violation of international law in the cases of those who were under 18 at the time of the alleged crime.

Amnesty International delegates will observe proceedings in Omar Khadr’s case in the coming days at Guantánamo. The organization will continue to call for military commission proceedings against him, and any other Guantánamo detainee, to be abandoned.

Not long before the USA came before the Committee on the Rights of the Child, it appeared before the UN Committee on the Elimination of Racial Discrimination (CERD). Among other things, the CERD reminded the USA of its obligation “to guarantee equality between citizens and non-citizens in the enjoyment of the rights set forth in article 5 of the Convention, including the right to equal treatment

¹ See Trials in error: Third go at misconceived military commission experiment, July 2009, <http://www.amnesty.org/en/library/info/AMR51/083/2009/en>.

before the tribunals and all other organs administering justice”, and “to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin.”

US nationals cannot be tried by the military commissions, only foreign nationals. Applying inferior trial protections on the basis of nationality violates the right to equality before the law.

In 2006, the USA appeared before the UN Human Rights Committee, the expert body established under the International Covenant on Civil and Political Rights (ICCPR) to oversee implementation of that treaty, which the USA ratified in 1992. Among the Human Rights Committee's recommendations was for the USA to ensure, in accordance with article 9(4) of the ICCPR, that anyone held in Guantánamo be able to take “proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release”.

Four years later, and nearly eight years after he was first detained, Omar Khadr has still not had this right realized. A habeas corpus petition challenging the lawfulness of his detention was first filed in US federal court on his behalf in July 2004. The merits of that petition have never been ruled on by any judge. On 16 April 2010, Omar Khadr's lawyers filed a new habeas corpus petition seeking to have the military commission charges against him dismissed and an order by the federal judge for his release.

Omar Khadr's trial by military commission is currently scheduled to begin on 12 July 2010. The main issue at the pre-trial proceedings due to begin in Guantánamo on 27 April will be the question of whether statements given by Omar Khadr in US military custody can be relied upon by the prosecution. The defence wants the statements excluded as evidence by the military judge on the basis that they were obtained under interrogation techniques and conditions of detention that violated the prohibition of torture and other ill-treatment. A fundamental minimum fair trial standard is the right not to be compelled to testify against oneself or to confess guilt.² Another is that no statement may be admitted as evidence in any proceedings where there is knowledge or belief that the statement has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment.³

Four years ago, the USA appeared in front of the UN Committee Against Torture for review of its compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee noted with concern the allegations that detainees in US custody had been subjected to torture or other ill-treatment and called for full and impartial investigations. In its 2008 conclusions on the USA, the Committee on the Rights of the Child also called on the USA to ensure impartial investigations into all reports of cruel, inhuman or degrading treatment of children in US custody in the context of armed conflict.

As Amnesty International has previously reported, Omar Khadr has alleged that he was subjected to torture and other ill-treatment in the US air base at Bagram in Afghanistan where he was first held, and also at the Guantánamo base where he has been held ever since. Among other things, he was subjected in Guantánamo to the sleep disruption/deprivation technique known as the “frequent flyer program”.

Amnesty International has long called for accountability and remedy for the human rights violations that have been committed by the USA in the name of countering terrorism in recent years. At the same time, the organization has called for any Guantánamo detainee whom the USA intends to prosecute to be promptly charged and brought to fair trial in an independent and impartial tribunal applying fair trial standards. The military commissions are not such tribunals. Any detainee the USA does not intend to prosecute in a fair trial should be immediately released.

² Article 14.3(g), International Covenant on Civil and Political Rights. Article 75.4(f) of Additional Protocol 1 to the Geneva Conventions.

³ UN Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment), 1992, par. 12, in UN Doc. HRI/GEN/Rev.7.

How would the USA respond if another government took a 15-year-old US national into its custody, subjected him to ill-treatment, and held him for the next eight years before bringing him to a military trial under procedures falling short of international fair trial standards? For one thing, the case would likely feature in the State Department's annual reports. But surely the USA would go further and demand his repatriation under such circumstances. The Government of Canada has continued to refuse to seek Omar Khadr's repatriation, despite Canadian federal court rulings that his rights have been violated, including the right to be free from ill-treatment. The Canadian authorities should think again, and inject some urgency into their pursuit for justice and remedy for Omar Khadr, including his repatriation.

The introduction to the latest US State Department human rights report, cited above, reminds the reader of "President Obama and Secretary [of State] Clinton's pledge that we will apply a single universal human rights standard to all, including ourselves." The USA should meet its international human rights obligations, and re-examine those treaty body recommendations to the US authorities that are still outstanding. After all, the Obama administration, advocating for the USA to be elected to membership on the UN Human Rights Council in 2009, promised that the "United States is committed to meeting its UN treaty obligations and participating in a meaningful dialogue with treaty body members". Assuming its seat on the Council in September 2009, the US government said that "As the United States seeks to advance human rights and fundamental freedoms across the globe, we embrace a commitment to live up to these ideals at home and to meet our international human rights obligations."

Working with the Canadian government to get Omar Khadr immediately out of Guantánamo would be entirely consistent with this commitment. Keeping him in Guantánamo or elsewhere in US military detention and pursuing his trial by military commission, would not.

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For further information on Omar Khadr's case, see:

USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing military commission, April 2008, <http://www.amnesty.org/en/library/info/AMR51/028/2008/en>

Long overdue, not 'premature': Canada must pursue Omar Khadr's repatriation, April 2008, <http://www.amnesty.org/en/library/info/AMR20/001/2008/en>

USA: Omar Khadr's trial by military commission a step closer. Canada must act, 12 May 2008, <http://www.amnesty.org/en/library/info/AMR51/038/2008/en>

USA / Canada: Omar Khadr is 'salvageable', military commissions are not, 5 June 2008, <http://www.amnesty.org/en/library/info/AMR51/055/2008/en>

USA: Child 'enemy combatants' among cases as military commission proceedings resume at Guantánamo, 13 August 2008, <http://www.amnesty.org/en/library/info/AMR51/093/2008/en>

USA: Urgent Action: Legal concern / Unfair trial: Omar Ahmed Khadr, 7 January 2009, <http://www.amnesty.org/en/library/info/AMR51/001/2009/en>

USA: Joint letter to President-elect Obama regarding Guantanamo detainee Omar Khadr, 12 January 2009, <http://www.amnesty.org/en/library/info/AMR51/002/2009/en>

Canada still refusing to seek Omar Khadr's repatriation from Guantánamo; Mohammed Jawad returned to Afghanistan, 28 August 2009, <http://www.amnesty.org/en/library/info/AMR04/001/2009/en>

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USA: Still failing human rights in the name of global 'war', 20 January 2010, <http://www.amnesty.org/en/library/info/AMR51/006/2010/en>

Supreme Court of Canada rules that Canadian authorities violated Omar Khadr's rights; fails to order effective remedy, 29 January 2010, <http://www.amnesty.org/en/library/info/AMR20/001/2010/en>

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